No. 12,710

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, Individually, and as District Director, Immigration and Naturalization Service, Department of Justice,

Appellant,

vs.

NAT YANISH and JOHN DIAZ,

Appellees.

APPELLANT'S REPLY BRIEF.

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1. THE QUESTION OF THE EFFECT OF SECTION 12 OF THE ADMINISTRATIVE PROCEDURES ACT (5 U.S.C. 1011) ON ADMINISTRATIVE PROCEEDINGS WITH REFERENCE TO APPELLEES YANISH AND DIAZ HAS NOT PREVIOUSLY BEEN LITIGATED IN THIS PROCEEDING.

The original judgment of the lower Court dismissing the complaint did not consider this point since the fact that the proceedings with respect to Yanish and Diaz had been instituted prior to the effective date of the Administrative Procedures Act did not appear on the face of the complaint.

On the first appeal, this Court had before it simply the question as to whether the lower Court erred in granting the government's motion to dismiss. The Record consisted only of the complaint and the motion to dismiss. It did not contain facts now in the record showing that as to appellees Yanish and Diaz the administrative proceeding had commenced prior to the effective date of the Administrative Procedures Act (September 11, 1946).

On the basis of the record then before it, this Court, on April 24, 1950, entered a per curiam opinion which in part states: "The judgment in this case is accordingly reversed and the cause remanded with instructions to grant the relief prayed for in the complaint, *or if that course is found to be unnecessary to make such other disposition of the cause as may be appropriate.*" (Italics supplied). Thus it may be seen that the Court below was instructed to make such disposition of the cause as would then have been appropriate, rather than specifically grant the prayed for relief. It was not a mandate from this Court, as was interpreted by the trial Court, to grant the injunction without permitting the government to file an answer should there be any material issue not presented on the face of the complaint. The order of the Court below precluded the government from establishing the fact that as to appellees Yanish and Diaz their administrative hearings had commenced prior to the effective date of the Administrative Procedures Act.

Section 12 of the Administrative Procedures Act provides in part, "and no procedural requirement

shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement". The issues of fact as to the date of the initiating of the administrative proceedings against appellees Yanish and Diaz would then have established in the trial Court the right of the government to proceed in those two cases without regard to the Administrative Procedures Act. It has been held by the Appellate Court in the second circuit that the Administrative Procedures Act did not apply to deportation proceedings which were instituted prior to the effective date of the Administrative Procedures Act. *United States ex rel Harisiades v. Shaughnessy,* 187 F. (2d) 137.

The decision of this Honorable Court in *Anderson v. Boyd,* 188 Fed. (2d) 530, follows the aforesaid opinion.

Counsel for appellees have cited at length excerpts of the Courts' opinions in the cases of *Briggs v. Penn. R.R.,* 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403; *United States v. Camou,* 184 U.S 572, 22 S. Ct. 505, 46 L. Ed. 694; and *Chaffin v. Taylor,* 116 U.S. 567, 6 S. Ct. 518, 29 L. Ed. 727, to bolster the argument raised by appellees,—"whether the same question previously ruled upon by this Court may be relitigated". However, it is well established that proceedings in the trial Court subsequent to the mandate of the Appellate Court are properly before the latter Court on a subsequent appeal. *Himely v. Rose,* 5 Cranch 312; *the Santa Maria: the Spanish Consul Libellant,* 10 Wheaton, Vol. 23 at p. 441.

The law is well settled that a lower Court may consider and decide any matters left open by the higher Court, and further, that any new matter is a proper subject for an appeal. The Supreme Court of the United States in *In re Sanford Fork and Tool Company,* 160 U.S. 247, at p. 256, stated:

> "But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. * * *. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

This opinion was reviewed and reaffirmed by the United States Supreme Court, *Sprague v. Ticonic National Bank, et al.,* 307 U.S. 161.

As stated above, this Court had before it on the first appeal only the complaint and motion to dismiss, and its opinion referred solely to the trial Court's order on the motion to dismiss. It is submitted that the question of the effect of Section 12 of the Administrative Procedures Act as we have shown supra, was not presented in the record as it then stood.

2. SUBSEQUENT STATUTORY AND REGULATORY PROVISIONS HAVE MADE HEARINGS UNDER THE ADMINISTRATIVE PROCEDURES ACT IMPOSSIBLE OF PERFORMANCE.

On July 27, 1950 the trial Court denied the government's motion for leave to file answer and entered a permanent injunction restraining appellant from initiating or conducting any proceedings seeking deportation of appellees Yanish and Diaz without compliance with the requirements of Sections 5, 7, 8 and 11 of the Administrative Procedures Act (5 U.S.C. 1004, 1006, 1007, 1010). From this decree of the District Court the government. on September 11, 1950, appealed to this Honorable Court.

Congress on September 27, 1950, enacted Public Law 843, 81st Congress, containing a provision prohibiting the conducting of deportation hearings in accordance with the hearing provisions of the Administrative Procedures Act, and on November 10, 1950 the deportation regulations were revised to conform with that statutory provision (see pp. iii, iv and v of appendix in appellant's opening brief).

The court's attention is invited to the fact that the government's appeal is from the order of the trial Court granting a permanent injunction after denying appellant's motion for leave to file answer. Consequently a change in law occurring subsequent to the trial Court's order must be applied at this time.*

A decision by this Honorable Court affirming the order of the lower Court would place appellant in the

*See cases cited on pages 21 and 22 of Appellant's Opening Brief.

position of being ordered to comply with non-existent laws and regulations and the result would be that, even should appellees be deportable, the government would be unable to effect their deportation from the United States even though their presence in the United States is considered prejudicial to the best interests of this country.

There is now no legal provision for the appointment of Hearing Examiners under the Administrative Procedures Act so far as deportation proceedings are concerned, and by the passage of Public Law 843, Congress took away the jurisdiction of any Hearing Examiner under the Administrative Procedures Act to hear and determine a deportation matter.

The appellees are in effect asking that the Immigration and Naturalization Service be required to grant to them a new deportation hearing under the now obsolete provisions of the Administrative Procedures Act. They contend that the word "hereafter" as contained in Public Law 843, 81st Cong. is prospective in scope and only refers to an action initiated in the future. Their view is obviously erroneous. The mere reading of the statute will clearly establish that the intent of Congress was to remove the burden from the Immigration and Naturalization Service of conducting this type of hearing. With the present litigation still undetermined the government was unable to afford the appellees a hearing under the Administrative Procedures Act during the time the aforesaid Act was in force. If this Honorable Court requires a new and complete hearing, such hearing would of ne-

cessity take place "hereafter" the enactment of the above referred to Public Law 843 of the 81st Congress, and would be contra to the expressed intent of that Congress.

We submit that the trial Court was in error in refusing to permit the government to show that as to the appellees the deportation proceedings were commenced prior to the effective date of the Administrative Procedures Act, hence were expressly excepted from the proceedings set up by that Act.

We submit further that the Congress by enacting Public Law 843 subsequent to the entering of the judgment by the trial Court took away the jurisdiction of any hearing examiners under the Administrative Procedures Act to hear any deportation case thereafter.

Dated, San Francisco, California,
August 10, 1951.

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